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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELECTIONS BOARD, et al.,

Appellants,

v.

THE REPUBLICAN PARTY OF WISCONSIN, et al.,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT SITTING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN UNDER 28 U.S.C. § 2284(a)

JURISDICTIONAL STATEMENT

BRONSON C. LA FOLLETTE
Attorney General
Counsel for Appellants
114 East, State Capitol
Madison, Wisconsin 53702
(608) 266-1222

ED GARVEY
Deputy Attorney General
DANIEL D. STIER
Assistant Attorney General

July, 1984

QUESTION PRESENTED

Whether the temporary lack of opportunity to vote in a state senate election caused by a reapportionment plan drafted under the system of staggered senate terms mandated by the Wisconsin Constitution constitutes an unconstitutional deprivation of the right to vote.

No. _____

IN THE

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ELECTIONS BOARD, et al.,

Appellants,

v.

THE REPUBLICAN PARTY OF WISCONSIN, et al.,

Appellees,

and

LEAGUE OF WOMEN VOTERS,

Intervening Party.

JURISDICTIONAL STATEMENT

This is a direct appeal under 28 U.S.C. § 1253 from an injunction entered by a three-judge federal district court on May 25, 1984, enjoining use of the reapportionment plan set forth in 1983 Wisconsin Act 29 on the ground that the

plan deprives persons moved by the plan from even-numbered to odd-numbered senate districts under Wisconsin's staggered-term system of the right to vote in 1984 state senate elections.

QUESTION PRESENTED

Whether the temporary lack of opportunity to vote in a state senate election caused by a reapportionment plan drafted under the system of staggered senate terms mandated by the Wisconsin Constitution constitutes an unconstitutional deprivation of the right to vote.

PARTIES

The appellants, the defendants in the federal district court, include the Elections Board (the "Board"), an independent agency of the State of Wisconsin, its individual members Gary J.N. Aamodt, Thomas Palay, Eric Halverson, Esther Kaplan, Ron Monat, John

Niebler, Helen Van Prooyen and Paul J. Swain, and its executive secretary, Kevin J. Kennedy. The Board has the statutory responsibility for, among other things, preparing all of the official ballot forms, promulgating the statutory notice requirements for candidates and elections, preparing a certified list of all of the candidates in all of the elections in the state, and recording and preserving election results. Secs. 5.05, 7.08 and 7.70, Wis. Stats. It is composed of three Democratic appointees, three Republican appointees and one member appointed by the Chief Justice of the Wisconsin Supreme Court. Sec. 15.61, Wis. Stats.

The appellees, the plaintiffs in the federal district court, are the Republican Party of Wisconsin and two individual Republican legislators, State

Senator Donald S. Hanaway and State Representative Tommy G. Thompson. The federal district court on February 10, 1984 granted the motion of the League of Women Voters to appear in the case, and the League has supported the appellees' position in the federal district court and in this Court.

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OPINIONS BELOW

The decision on appeal, set forth at App. 101-16, is unreported.

JURISDICTION

The decision and injunction on appeal were issued on May 25, 1984, by a three-judge federal district court properly constituted under 28 U.S.C. § 2284(a). See App. 101-16. On May 29, 1984, the three-judge court denied appellants' request for a stay pending appeal. See App. 117-18. This Court on June 7, 1984, entered a stay of the mandate of the three-judge court pending timely docketing and ultimate disposition of the appeal.

A notice of appeal was filed in the district court on May 30, 1984. App. 119-24. This appeal is being docketed in this Court within sixty days from the

filing of the notice of appeal as required by Supreme Court Rule 12.1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, United States Constitution.

> The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and

> after the adoption of this amendment all senators shall be chosen for the term of four years.

Wis. Const. art. IV, § 5.

STATEMENT OF THE CASE

The Wisconsin Legislature adopted a reapportionment plan in 1981 but the plan was vetoed by the Governor. The three-judge federal court was asked to choose among various plans but instead created its own plan to correct the unacceptable population inequality contained in the then-existing legislation adopted in 1972. The court's plan was announced in mid-June 1982. An appeal was not practical given time constraints and thus elections were held under the court plan. The court directed that its plan would "be effective for the 1982 legislative elections and thereafter until such time as a valid constitutional redistricting plan is enacted into

law." Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 639 (E.D. Wis. 1982). The 1982 elections and five special elections were conducted under the court plan.

On July 20, 1983, 1983 Wisconsin Act 29 (hereinafter "the Act") became effective upon being signed into law by the Governor. Four special elections have been held under the Act. The Act represents virtually absolute compliance with the constitutional principle of "one person - one vote." With a state population of just over 4.7 million people, the range of deviation from the ideal norm of equal population is just 1.72% in the state assembly and just 1.05% in the senate. The Legislature "assigned the highest priority to achieving the constitutionally mandated goal of precise population equality."

Building upon the plan developed by the court, the Legislature met that goal and, in the process, it "created the lowest population deviation in the history of legislative redistricting in this state." Act, section 4.001, App. 125-29.

In developing the Act, the Legislature worked from the court plan and expressed its intent to improve upon it. Act, section 4.001(4), App. 128. It improved upon the court plan in terms of population equality, particularly in senate districts where inequality was reduced from 1.23% to 1.05%. In doing so, the Legislature gave consideration to the need for contiguity and compactness, the maintenance of communities of interest and competitive legislative districts. Act, section 4.001(3), App. 126-27.

On August 18, 1983, plaintiffs-appellees filed a motion for leave to file a supplemental complaint, alleging that the Act constituted a partisan gerrymander, that districts created under the Act lacked compactness and contiguity and that the Act moved 173,976 persons from even- to odd-numbered senate districts thereby depriving them of the opportunity to vote in the 1984 senate election.

The plaintiffs-appellees did not allege any one person, one vote problem nor was there any suggestion that black and Hispanic voting strength was, in any way, diluted by the Act. On February 10, 1984, the court ordered that briefs be filed April 20, 1984, and oral argument held on May 21, 1984.

On May 25, 1984, over ten months after the Act became law and just seven

days before commencement of the State's election process, the court declared the Act unconstitutional and enjoined its further use, ordering reinstatement of the court plan on the exclusive ground that the Act unnecessarily disenfranchised approximately three percent of Wisconsin citizens (174,000 of the State's 4.7 million citizens) who were moved from even- to odd-numbered senate districts.

The three-judge court denied appellants' motion for stay pending appeal on May 29, 1984. Appellants filed a notice of appeal on May 30, 1984. App. 119-24. On June 7, 1984, this Court entered a stay of the mandate of the three-judge court pending timely docketing and ultimate disposition of the appeal.

ARGUMENT

The Question Presented Is Substantial.

The issuance of a stay of the three-judge court's decision on June 7, 1984, indicates that this Court considered it likely that probable jurisdiction would be noted, and determined that there is a fair prospect of reversal of the three-judge court's decision. See Karcher v. Daggett, 455 U.S. 1303 (1982) (Brennan, J., in chambers, March 15, 1982). For the reasons set forth hereafter, the Court should note probable jurisdiction and summarily reverse the lower court's decision. For those same reasons, if the Court does not summarily reverse the three-judge court's decision, the issue presented requires plenary consideration, with briefs on the merits and oral argument, for its resolution.

A. Reapportionment is a legislative function.

Apportionment is primarily a matter for legislative judgment. Upham v. Seamon, 456 U.S. 37, 41 (1982); White v. Weiser, 412 U.S. 783, 795 (1973); Reynolds v. Sims, 377 U.S. 533, 586 (1964). The "legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework ...." Connor v. Finch, 431 U.S. 407, 414-15 (1977). Consequently, "substantial deference is to be accorded the political decisions of the people of a State acting through their elected representatives." Brown v. Thomson, ___ U.S. _____, 103 S. Ct. 2690, 2698-99 (1983). Apportionment, "dealing as it must with fundamental 'choices about the nature of representation,' [citation

omitted], is primarily a political and legislative process." Gaffney v. Cummings, 412 U.S. 735, 749 (1973).

In its 1982 decision, it seemed that the three-judge court recognized that its plan was temporary, and that enactment of a permanent plan was a legislative responsibility. It held that its plan would only "be effective for the 1982 legislative elections and thereafter until such time as a valid constitutional redistricting plan is enacted into law." Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. at 639. By 1984, however, that same panel concluded that it must force the Legislature to violate the state constitution by truncating the mandated four-year terms of state senators, or live with the court plan for the balance of the decade.

B. The three-judge court decision usurps the legislative reapportionment function.

Population equality is the paramount goal of any reapportionment plan. Connor v. Finch, 431 U.S. at 409-10; Chapman v. Meier, 420 U.S. 1, 22 (1975); Reynolds v. Sims, 377 U.S. at 568, 577. The Act achieved the lowest population deviation in the history of legislative redistricting in Wisconsin. It improved upon the court plan, particularly in senate districts, where the maximum deviation from population equality was reduced from 1.23% to 1.05%. Furthermore, the Act preserved compactness and contiguity of districts, maintained communities of interest and restored a measure of competitive political balance in the legislative districts.

The cost of the modifications made by the Legislature, which is a cost borne

in any reapportionment under a staggered-term system, was a delay in the opportunity to vote in senate elections for those persons who were moved from even- to odd-numbered senate districts under the Act. (Senate elections will be held in even-numbered districts in the 1984 general election.) The Act moved 173,976 persons out of even-numbered districts. There is no suggestion by appellees or the lower court that these citizens were "targeted." They are scattered throughout the State, and they total less than 3.7% of the State's population. The vote of 145,026 of those persons is delayed for only two years, and 28,950 for four years. There was no allegation that the movement of these persons had any discriminatory purpose or effect relative to any political group.

The three-judge court could find no fault with the Act in terms of population equality since it was better than the court plan. Neither did it find any flaws with regard to any other constitutional test used by the Supreme Court since Reynolds v. Sims, including compactness and contiguity, maintenance of communities of interest or restoration of competitive balance. Nonetheless, the Act was struck down.

The basis for the three-judge court's action is the "disenfranchisement" of the persons who were moved out of even-numbered senate districts. The three-judge court determined that this "disenfranchisement" is now of constitutional magnitude, despite the fact that its own plan had disenfranchised a much larger number of persons in 1982. In its 1982 decision, the court made no mention

of having given any consideration to the disenfranchisement problem, and did not suggest in any way that it had attempted to minimize or reduce such disenfranchisement. In fact, the court correctly characterized the argument that its plan created such disenfranchisement as "a house of cards that collapses when exposed to even the gentle breeze of cursory analysis." Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. at 659. Now that same court has usurped the legislative function even though 100% of voters reside in properly apportioned districts, 97% will vote for Senators as scheduled and 100% will vote for Assembly persons in 1984. The inescapable conclusion is that the court preferred its own plan.

In 1982, the Democratic Party leadership argued in support of its

motion for stay pending appeal of the court's first decision, that the movement of senate district lines and renumbering of some districts from odd-numbered to even-numbered under the court plan resulted in "no vote" and "no representation" for 713,225 Wisconsin residents. More specifically, the argument consisted of a two-pronged attack on the court plan. First, it was argued that the voters were denied representation by the court's shifting of district lines which resulted in incumbent senators residing outside districts from which they were elected. The second part of the argument was that the court's renumbering of districts from odd-numbered to even-numbered disenfranchised the voters in those districts because their opportunity to vote for a new senator was delayed for

two years under Wisconsin's constitutionally mandated system of staggered terms. It is the latter part of the argument that forms the basis for the court's striking down of the Act.

The Wisconsin Supreme Court rejected this argument more than ninety years ago:

> The complaint charges that the senate districts are so numbered in ch. 482 that large numbers of electors who were last permitted to vote for senators in 1888 cannot do so again until 1894, while other large numbers of electors who voted for senators in 1890 may again do so in 1892. This is alleged as a reason why the act is invalid. The court finds in the constitution no authority conferred upon it to interfere with the numbering of the senate districts. In that respect the power of the legislature is absolute.

The State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 531, 51 N.W. 724 (1892).

Courts that have more recently dealt with the interaction of reapportionment

with staggered term provisions of state constitutions have likewise concluded that there is no merit to allegations of constitutional deprivation.

The legitimacy of the state's interest in staggered terms has been acknowledged, with the recognition that such terms promote efficiency and effectiveness by assuring continuity in the Legislature. Pate v. El Paso County, Texas, 337 F. Supp. 95, 98 (W.D. Tex.), aff'd without opinion, 400 U.S. 806 (1970). The courts' acceptance of the legitimacy of staggered term provisions has generally led them to characterize disenfranchisement arguments as "untenable" or "without merit." See, e.g., Ferrell v. State of Oklahoma ex rel. Hall, 339 F. Supp. 73, 82 (W.D. Okla.), aff'd mem., 406 U.S. 939 (1972), and Mader v. Crowell, 498 F. Supp. 226,

230 (M.D. Tenn.), vacated on other grounds, 444 U.S. 505 (1980). In Mader, the three-judge court professed its "opinion that plaintiffs' claims fail to rise to constitutional magnitude. The temporary disenfranchisement of these voters violates neither the equal protection clause nor any other constitutional provision. [Citations omitted.] Shifts from odd-numbered to even-numbered districts and vice versa are an unavoidable consequence of the reapportionment ...." 498 F. Supp. at 231. See also Kentopp v. Anchorage, 652 P.2d 453, 462 (Alaska 1982); Barnett v. Boyle, 197 Neb. 677, 250 N.W.2d 635, 637 (1977); Legislature of State of California v. Reinecke, 110 Cal. Rptr. 718, 516 P.2d 6, 12 (1973).

In 1962, the Supreme Court of Iowa explained why the right to vote is not

affected by a reapportionment plan's movement of voters from one staggered term district to another:

> Until there is an election or some one or some thing to vote for, the question of the right to vote is academic but not real. There is no denial of a right to vote until there is an election. There is no disenfranchisement as to a particular office when there is no vacancy to be filled. The Constitution does not say a voter is entitled to vote for every office in our national or state government at every election. It does say he is entitled to vote at all elections authorized by law. That simply means he is entitled to vote on candidates and propositions submitted to the voters in his voting precinct.

Selzer v. Synhorst, 113 N.W.2d 724, 732 (Iowa 1962). Though Reynolds v. Sims was decided since then, it has been recognized that Reynolds and its progeny guarantee only that votes will have equal weight. They do not mandate equality relative to the timing of votes. In re

Reapportionment of Colo. Gen. Assembly, 647 P.2d 191, 198 n. 11 (Colo. 1982). As stated in Pate v. El Paso County, Texas, 337 F. Supp. at 98, "[a]ll that is required is that equal weight be given to the vote of each qualified voter, i. e., that there be substantially equal populations within each district ...."

In the years following Reynolds v. Sims, federal courts have on occasion found it necessary to interfere with the operation of staggered term provisions of state constitutions. But that drastic action has been taken only for the purpose of terminating plans that violated the equal population standard enunciated in Reynolds. See, e.g., Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965) and Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965). Those decisions lend no support to the three-

judge court's decision that voters are deprived of their right to vote by the Act and its interaction with the staggered term provision of the Wisconsin Constitution.

The three-judge court should have followed that body of law which holds that no unconstitutional disenfranchisement occurs when a reapportionment plan moves voters between staggered term districts. But it did not. Instead, the court presented the Legislature with a "Hobson's choice": elect all Senators in 1984 to cure the perceived constitutional violation, thus violating the state constitution or live with our plan which admittedly was hastily drawn and based on some inaccurate population data. 543 F. Supp. at 638. The court cited Mader v. Crowell and In re Reapportionment of Colo. Gen. Assembly, turning that entire

body of law on its head. It held that, since the court created a reapportionment plan in 1982 that was not constitutionally defective, the Legislature was prohibited from subsequently reapportioning itself because such reapportionment was not "absolutely necessary" and disenfranchisement was thus not "unavoidable."

In both Mader and Colo. Gen. Assembly, the courts upheld legislative reapportionment plans which moved persons from even- to odd-numbered districts and vice versa. As discussed above, the three-judge federal court in Mader recognized that disenfranchisement is an "unavoidable consequence" of any reapportionment. The court did not say that the Legislature is constitutionally

barred from exercising its reapportionment prerogative whenever it is possible to avoid exercising it.

Similarly, in Colo. Gen. Assembly, the Supreme Court of Colorado did not hold that a Legislature may only reapportion when "absolutely necessary" to cure constitutional defects. Rather, in conjunction with its upholding of the reapportionment plan in question, the court stated in obiter dictum that there was no constitutional violation "[w]hen this result is absolutely necessary." There was no attempt by the court to delineate the boundaries of "absolute necessity," or to suggest when disenfranchisement under a reapportionment plan may be necessary. There was no further discussion of "absolute necessity" whatsoever.

The three-judge court seized upon the "absolute necessity" and "unavoidable" language in the above two cases to establish an unprecedented rule that any temporary disenfranchisement caused by a legislative reapportionment plan which is implemented subsequent to an interim court-ordered plan is without "just cause" and renders the legislative plan unconstitutional. App. at 112-14. Common sense and the cases discussed above recognize that some temporary disenfranchisement will occur under any reapportionment plan drafted subject to a staggered term requirement. And the three-judge court rule renders a plan unconstitutional as soon as one citizen is moved from an even- to odd-numbered district. The decision effectively bars reapportionment by the Legislature once a court has ordered a plan.

The Supreme Court has cautioned federal courts to avoid attempts to "fine-tune" legislatively enacted reapportionment plans:

> [T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan.

Gaffney v. Cummings, 412 U.S. at 749.

The three-judge court has reversed this entire approach, holding that the Legislature may not "fine-tune" an interim court-ordered plan which was designed only to remedy an obvious constitutional defect and to govern elections only until the Legislature enacted its own plan.

This decision establishes a dangerous precedent. If the decision becomes the law of the land, the most dramatic development since Baker v. Carr, 369 U.S. 186 (1962), will be approved. Apportionment in the future will become primarily a judicial function with every detail subject to approval by the court. The Legislature will be reduced to a position of drafting a plan and submitting it first to the Governor for approval or veto, and then to the court.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and summarily reverse the lower court's decision. In the alternative, the Court should give plenary consideration to this

appeal, with briefs on the merits and oral argument.

Dated at Madison, Wisconsin, this 27th day of July, 1984.

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin
Counsel for Appellants

114 East, State Capitol
Madison, Wisconsin 53702
(608) 266-1222

ED GARVEY
Deputy Attorney General of Wisconsin

DANIEL D. STIER
Assistant Attorney General of Wisconsin

OF COUNSEL:

ARNOLD & PORTER
1200 New Hampshire Avenue
Washington, D.C. 20036

LA FOLLETTE, SINYKIN,
ANDERSON & MUNSON
222 West Washington Avenue
Madison, Wisconsin 53701

APPENDIX

EDITOR'S NOTE

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

THE REPUBLICAN PARTY OF WISCONSIN, DONALD S. HANAWAY and TOMMY G. THOMPSON,

Plaintiffs,

v. Civil Action No. 82-C-113

ELECTIONS BOARD, an independent agency of the State of Wisconsin; its Chairman, WILLIAM MATTKA; each of its members individually, GARY AAMODT, STEPHEN A. BEYER, GREGORY B. CONWAY, ESTHER KAPLAN, JAMES MURPHY, JOHN NIEBLER, and HELEN SIGMUND, and its Executive Secretary, GERALD J. FERWERDA,

Defendants,

and

THE LEAGUE OF WOMEN VOTERS,

Intervening Party.

DECISION AND ORDER

Before BAUER, Circuit Judge, EVANS, District Judge, and GORDON, Senior District Judge.

On February 2, 1982, a Complaint[1/] was filed in this court seeking a declaration that Wisconsin's legislative districts as then constituted were unconstitutional. The Complaint also asked that a judicial plan of reapportionment be issued. The case was originally assigned to Judge Terence T. Evans of the United States District Court for the Eastern District of Wisconsin. Judge Evans determined that the case was appropriate for treatment by a three-judge panel pursuant to 28 U.S.C. § 2284. Accordingly, Judge Evans requested in a letter to the Chief Judge of the United States Court of Appeals for the Seventh Circuit that two other judges be

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[1/]The Complaint was filed by the original plaintiffs in this action, not the plaintiffs referred to in the caption of this opinion. The parties were realigned in our Order of February 10, 1984.

appointed to form a panel to consider this case. On February 8, 1982, Chief Judge Walter J. Cummings of the Court of Appeals designated Judge Myron L. Gordon of the United States District Court for the Eastern District of Wisconsin and Judge William J. Bauer of the United States Court of Appeals for the Seventh Circuit to join Judge Evans in forming a three-judge court to consider this case.

On February 22, 1982, we issued an Order declaring that the then-existing Wisconsin apportionment statute was unconstitutional. On June 9, 1982, we issued a decision resolving the case which included a judicially-ordered reapportionment of Wisconsin's legislative districts. On June 17, 1982, an Order amending the plan issued.

Although some of the original parties in this case and a few elected officials in Wisconsin voiced disapproval over the way the legislative districts were formed by the court, no further action was immediately taken by the Legislature and no appeal of our decision was pursued. Our Reapportionment Plan went into effect and the 1982 elections were conducted pursuant to it.

Legislators elected pursuant to the districts established in our Plan -- all 99 members of the Wisconsin Assembly and one-half of the members of the Senate -- joined those Senators that had been elected to serve four-year terms in 1980 to form the Wisconsin Legislature that convened to do the State's business in January of 1983.

In addition to the elections in November of 1982, five special elections were held following the district lines established by this Court.

On July 1, 1983, the Wisconsin Legislature passed the 1983-85 Biennial Budget Bill which contained a new Reapportionment Plan. That portion of the Budget Bill that included a Reapportionment Plan was vetoed by Governor Anthony S. Earl. Governor Earl stated that he supported the contents of the Reapportionment Plan, but that a plan should not be passed as part of the budget bill. He promised to call a special session of the Legislature to consider reapportionment.

Subsequently, a special session of the Legislature was called. On July 15,

1983, the Legislature passed and Governor Earl signed a Reapportionment Bill which changed the configurations of the districts as drawn by this Court. Five members of the Legislature were elected subsequent to July 15, 1983, using the district lines established in the '83 Act.

On August 18, 1983, a motion for leave to file a Supplemental Complaint was filed by the Republican Party of Wisconsin and two of its members. It challenged the constitutionality of the '83 Reapportionment Act and requested an injunction prohibiting its use in the elections scheduled later this year. They also seek to reestablish the '82 Court Plan under which present members of the Wisconsin Legislature have been

elected as the plan to govern the 1984 elections. The League of Women Voters, a party to this suit when our June 1982 Order was issued, also claims that the '83 Act is unconstitutional.

Unlike the original Complaint which claimed that population changes, as reflected in the 1980 census, made the 1971 reapportionment statute no longer consistent with the one person, one vote principle, the Supplemental Complaint alleges that the boundaries established in the '83 Act are not as contiguous and compact "as practicable" (Supplemental Complaint, First Cause of Action), that the '83 Act denies 173,976 Wisconsin citizens the right to vote for a State Senator every four years (Supplemental Complaint, Second Cause of Action), and that the new statute is not a "good faith effort to assure fair and effective

representation" in the Legislature (Supplemental Complaint, Third Cause of Action). The '83 enactment is said to be in violation of the United States Constitution and the Constitution of the State of Wisconsin. In a Decision and Order issued on February 10, 1984, we granted leave to the new plaintiffs to file their supplemental complaint. We did so because our Order of June 9, 1982 stated that our plan would remain in effect until "such time as a valid constitutional redistricting plan is enacted into law" (emphasis added).

Briefs have been received and oral arguments were entertained on May 21, 1984. Because we believe that the '83 Act is unconstitutional, we declare it to be such and order that the '82 Court Plan govern future legislative elections

again, "until such time as a valid legislative plan is enacted."

We have carefully considered the objections raised to the '83 Legislative Reapportionment Plan. With the exception of one, we find the objections to be without merit. Unfortunately for the health of the plan, its one defect is fatal.

First we turn to the contentions we believe have no merit. We find unpersuasive the argument that the '83 Plan creates districts that are "awkward, illogical and at times bizarre." Further, we find wanting the argument that the Plan fails to recognize communities of interest or that it constitutes "egregious" (i.e., flagrant or notorious, as opposed to anticipated) political gerrymandering that would normally be the expected product of a

process that is by its very nature "political".

Also, we reject all arguments that the '83 Act is invalid because it is not as good as the '82 Plan. Beauty, here at least, is truly in the eyes of the beholder. The viewing of any reapportionment plan as "better" or "worse" than another, particularly by an elected official, often depends on whether he or she has the hide of a pachyderm or a donkey. We need say no more about the arguments that we reject. We turn now to the real bone of contention in this case.

The fatal flaw in the '83 Plan is that it unnecessarily disenfranchises 173,976 citizens of Wisconsin. Under the '83 Plan, 145,026 residents of Wisconsin are in Senate districts that last voted for a State Senator in 1980. In

addition, 28,950 residents reside in Senate districts that last voted for a State Senator in 1978. All 173,976 residents, under the '83 Plan, will be ineligible to vote for a State Senator until 1986. This situation, under the peculiar facts of this case, cannot be constitutionally tolerated.

Wisconsin requires a staggered-term system for its State Senators. Seventeen Senators are elected in one even numbered year and the other sixteen are elected in the next even numbered year. Wisconsin also requires that its staggered-term system be retained following reapportionment. This apparatus is not challenged by any of the parties before us. Because, however, the staggered-term system is not scrapped for the first election after each reapportionment, every new reapportionment plan creates a

situation that results in "holdover" Senators and the temporary disenfranchisement of some residents for a two-year period. After two years have passed, the new plan is completely implemented and no residents are deprived under it of their constitutional right to vote in representative elections.

The temporary disenfranchisement of citizens is constitutionally tolerated under either of two related theories. Due to the complexities of the reapportionment process, a temporary loss of voting rights (the cases speak of a "delay" in the right to vote) is tolerated when it is an "absolute necessity" or when it is "unavoidable". See In re Reapportionment of the Colorado General Assembly, 647 P.2d 191 (Colorado, 1982) and Mader v. Crowell, 498 F.Supp. 226 (M.D. Tenn. 1980). A temporary delay

in voting, within a staggered-team structure, is an "absolute necessity" and is "unavoidable" when it is caused by the enactment of a new plan that is passed to correct a constitutionally-defective districting system. For this reason, partial temporary disenfranchisement is tolerated when a State, or as occurred here, when a Court orders that a new districting plan be followed. Thus, the temporary disenfranchisement that occurred in Wisconsin under the '82 Court Plan (the result, of course, would have been the same if the Legislature had acted in '82) did not run afoul of the Constitution.

After the 1982 November elections, the '82 Court Plan was fully implemented. No further "delays" in voting rights would have occurred. Because the '82 Plan was constitutional,

the passage by the Legislature of its '83 Plan was not "necessary" to correct an existing situation that was unconstitutional. Instead, the '83 Act was passed for other reasons. The disenfranchisement that would occur if the '83 Plan remained in force is not an "absolute necessity" nor is it "unavoidable" as those terms are used in the reapportionment cases.

Had the Legislature enacted a reapportionment plan similar to its '83 effort before the November 1982 elections, we would have no trouble sustaining its validity against a constitutional challenge. Because to sustain it now would adversely affect the voting rights of 173,976 people without just cause, we must declare it to be unconstitutional. We hasten to add that we do not strike the law down out of any

pride of authorship in our '82 Plan. We act as we do because we believe it is required under the Constitution. This is not to say that major surgery, like ordering all Senators to stand for election in 1984, would not make the '83 plan constitutionally antiseptic. Such a drastic step, however, should not be taken by a federal court when the elected representatives of Wisconsin, even considering the time constraints imposed upon them, have time to consider that possibility.

Therefore, for the foregoing reasons, we:

1. Declare that the 1983 Wisconsin Legislative Reapportionment Act is unconstitutional. We enjoin its use.

2. Order that the 1982 Court Reapportionment Plan govern further Wisconsin legislative elections until

such time as a valid constitutional plan of reapportionment is enacted by the elected officials of Wisconsin.

SO ORDERED at Milwaukee, Wisconsin, this 25 day of May, 1984.

BY THE COURT:

WILLIAM J. BAUER
UNITED STATES CIRCUIT JUDGE

TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

MYRON L. GORDON
UNITED STATES SENIOR DISTRICT JUDGE

UNITED STATES SENIOR DISTRICT JUDGE
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

THE REPUBLICAN PARTY OF WISCONSIN, DONALD S. HANAWAY and TOMMY G. THOMPSON,

Plaintiffs,

v. Civil Action No. 82-C-113

ELECTIONS BOARD, an independent agency of the State of Wisconsin; its Chairman, WILLIAM MATTKA; each of its members individually, GARY AAMODT, STEPHEN A. BEYER, GREGORY B. CONWAY, ESTHER KAPLAN, JAMES MURPHY, JOHN NIEBLER, and HELEN SIGMUND, and its Executive Secretary, GERALD J. FERWERDA,

Defendants,

and

THE LEAGUE OF WOMEN VOTERS,

Intervening Party.

ORDER

Before BAUER, Circuit Judge, EVANS, District Judge, and GORDON, Senior District Judge.

The defendants have moved for a stay and a modification of the injunction

issued in this case on May 25, 1984. The relief is sought pending an appeal of our decision to the United States Supreme Court.

We have considered the papers submitted by the defendants and have conferred on the matter and the Court, by unanimous vote, DENIES the request for a stay pending appeal and further DENIES the motion to modify the injunction issued on May 25, 1984.

SO ORDERED at Milwaukee, Wisconsin, this 29th day of May, 1984.

BY THE COURT:

WILLIAM J. BAUER
UNITED STATES CIRCUIT JUDGE

TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

MYRON L. GORDON

UNITED STATES SENIOR DISTRICT JUDGE
IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

THE REPUBLICAN PARTY OF WISCONSIN, DONALD S. HANAWAY and TOMMY G. THOMPSON,

Plaintiffs,

v. Case No. 82-C-113

ELECTIONS BOARD, an independent agency of the State of Wisconsin; its Chairman, GARY J.N. AAMODT; each of its members individually, THOMAS PALAY, ERIC HALVERSON, ESTHER KAPLAN, RON MONAT, JOHN NIEBLER, and HELEN VAN PROOYEN and PAUL J. SWAIN; and, its executive secretary, KEVIN J. KENNEDY,

Defendants,

and

THE LEAGUE OF WOMEN VOTERS,

Intervening Party.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that the Elections Board for the State of Wisconsin and the other defendants hereby appeal to the Supreme Court of the United

States from the final order entered on May 25, 1984 by the three-judge federal panel in this matter finding Wisconsin's legislative reapportionment statute, § 4.01 et seq., Wis. Stats., unconstitutional and enjoining its implementation in the 1984 legislative elections.

The defendants take this appeal pursuant to 28 U.S.C. §§ 1253.

Dated: May 29, 1984.

/s/ Bronson C. La Follette
Counsel for the Defendants

Bronson C. La Follette
Attorney General

Ed Garvey
Deputy Attorney General

Daniel D. Stier
Assistant Attorney General

State of Wisconsin
Post Office Box 7857
Madison, WI 53707-7857
(608) 266-1212

OF COUNSEL

/s/ Brady C. Williamson
Brady C. Williamson
Margaret J. Vergeront
LaFollette, Sinykin, Anderson
& Munson
Suite 300
222 West Washington Avenue
Post Office Box 2719
Madison, Wisconsin 53701
(608) 257-3911

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

THE REPUBLICAN PARTY OF WISCONSIN, DONALD S. HANAWAY and TOMMY G. THOMPSON,

Plaintiffs,

v. Case No. 82-C-113

ELECTIONS BOARD, an independent agency of the State of Wisconsin; its Chairman, GARY J.N. AAMODT; each of its members individually, THOMAS PALAY, ERIC HALVERSON, ESTHER KAPLAN, RON MONAT, JOHN NIEBLER, and HELEN VAN PROOYEN and PAUL J. SWAIN; and, its executive secretary, KEVIN J. KENNEDY,

Defendants,

and

THE LEAGUE OF WOMEN VOTERS,

Intervening Party.

CERTIFICATE OF SERVICE

I, Brady C. Williamson, a member of the bar of the State of Wisconsin and a member of the bar of the U.S. Supreme Court, hereby certify on behalf of the defendants that all parties required to

be served have been served with the "Notice of Appeal to the Supreme Court of the United States" in this matter. The paties were served by mailing a copy of the Notice of Appeal to their counsel, listed below, by depositing the document in a United States post office or mail box, with first-class postage prepaid, addressed to the counsel of record at his or her post office address.

Parties and counsel served:

Gordon B. Baldwin
Law School
University of Wisconsin
Madison, Wisconsin 53706
Counsel for the Plaintiffs

Robertamarie Kiley
P.O. Box 3174
Madison, Wisconsin 53704
Counsel for the Intervening Party

Dated: May 30, 1984.

LA FOLLETTE, SINYKIN, ANDERSON
& MUNSON

By: /s/ Brady C. Williamson
Brady C. Williamson

Suite 300
222 West Washington Avenue
Post Office Box 2719
Madison, WI 53701
(608) 257-3911

CHAPTER 4

SENATE AND ASSEMBLY DISTRICTS

SUBCHAPTER 1

GENERAL PROVISIONS

4.001 Legislative redistricting; equal population. (1) Based on the certified official results of the 1980 census of population of Wisconsin, as received by this state from the U.S. bureau of the census on March 23, 1981, under P.L. 94-171, the state is divided into 33 senate districts each composed of 3 assembly districts. Each senate district shall be entitled to elect one member of the senate. Each assembly district shall be entitled to elect one representative to the assembly.

(2) All senate districts, and all assembly districts, are as equal in the number of inhabitants as practicable within the guidelines further set forth

in this section. Because the certified total number of inhabitants of this state on the 1980 census date was 4,705,521, each of the 33 senate districts contains approximately 142,592 inhabitants and each of the 99 assembly districts contains approximately 47,531 inhabitants.

(3) In redistricting the state based on the 1980 census of population, the legislature has assigned the highest priority to achieving the constitutionally mandated goal of precise population equality among the districts, resulting in an assembly deviation range of 1.73[1] percent (high assembly district plus 0.87 percent, low assembly district minus 0.86[1] percent) and a senate deviation

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[1]NOTE by LEGISLATIVE REFERENCE BUREAU: The correct figures are "1.72" percent for the assembly deviation range, and "minus 0.85" percent for the low assembly district (see statistical appendix on pages 655-657).

range of 1.05 percent (high senate district plus 0.38 percent, low senate district minus 0.67 percent). To the very limited extent that precise population equality is unattainable, ss. 4.009 and 4.01 to 4.99 reflect a good faith effort to apportion the legislature giving due consideration to the need for contiguity and compactness of area, the maintenance of the integrity of political subdivisions and of communities of interest, and competitive legislative districts. Island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) has been treated as a contiguous part of its municipality.

(4) The enactment of the redistricting based on the 1980 census of population reflects the legislature's recognition of its responsibility under

the constitution to district anew the senate and assembly after every decennial federal census of population. When the legislature and governor did not fulfill that responsibility in 1982, a federal district court promulgated legislative districts to "be effective for the 1982 legislative elections and thereafter until such time as a valid constitutional redistricting plan is enacted into law." In enacting ss. 4.009 and 4.01 to 4.99, the legislature has worked from the court plan and, consistent with the policy of the state expressed in sub. (3), has improved upon it. The resulting senate and assembly districts closely approximate the goal of precise population equality among districts, appropriately divide political subdivisions, and create the lowest popu-

lation deviation in the history of legislative redistricting in this state.

(5) In enacting ss. 4.009 and 4.01 to 4.99, the legislature and its members recognize the obligation imposed by their constitutional oath of office to represent the interests of the citizens who elected them and all of the other citizens of the state of Wisconsin. The legislative districts based on the 1980 census of population reflects the legislature's intent to enact a plan of reapportionment that encourages competitive elections, in order to promote a healthy democratic process which accurately reflects the will of the citizens of the state of Wisconsin.

4.002 Municipal wards. (1) DEFINITION. Except as further provided in this section, in this chapter "ward" means the municipal wards created under

s. 5.15 based on the results of the 1980 federal census of population and in effect on January 1, 1982.

(2) MILWAUKEE, CITY OF. Any reference to a ward of the city of Milwaukee means the wards created by ordinance 142 dated November 17, 1981 (file number 80-1517-D), as affected by the elections commission adjustments of August 1982.

(3) OSHKOSH, CITY OF. Ward 42 of the city of Oshkosh includes the annexation from the town of Algoma.

4.003 Description of boundaries. Wherever in this chapter territory is described by geographic boundaries, the following conventions are used:

(1) Each bound continues to the intersection with the bound next named,

or to the intersection with a straight-line extension of such bound.

(2) If the bound is a street, it follows the centerline of such street or the centerline of such street extended.

(3) If the bound is a railroad right-of-way, it follows the centerline of such railroad right-of-way.

(4) If the bound is a river or stream, it follows the center of the main channel of such river or stream.

(5) If the bound follows a municipal boundary, it coincides with such boundary.

4.004 Elections to the legislature. On or after the effective date of this act (1983), any special election to the legislature called to fill a vacancy for the balance of an unexpired term, any election to recall a member of the legislature, and any regular election

to the legislature, shall be from the districts as described in ss. 4.009 and 4.01 to 4.99.

4.005 Territory omitted from legislative redistricting. (1) In case any town, village or ward in existence on the effective date of a legislative redistricting act has not been included in any assembly district, such town, village or ward shall be a part of the assembly district by which it is surrounded or, if it falls on the boundary between 2 or more districts, of the adjacent assembly district having the lowest population according to the federal census upon which the redistricting act is based.

(2) The boundaries of legislative districts established by this chapter are not altered by any change in the county boundaries under ch. 2, by the creation

of any town, village, city or ward or by any municipal annexation, consolidation or detachment.

BEST AVAILABLE COPY

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FILED
AUG 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELECTIONS BOARD, et al.,

Appellants,

v.

THE REPUBLICAN PARTY OF WISCONSIN, et al.,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT SITTING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN UNDER 28 U.S.C. § 2284(a)

REPLY TO JURISDICTIONAL STATEMENT AND MOTION TO DISMISS

GORDON B. BALDWIN
Law School
University of Wisconsin
Madison, WI 53706
(608) 263-2077

KURT NEWBURY SCHACHT
McBurney, Wyngaard & Wilson
Suite 1000, Verex Building
150 East Gilman Street
Madison, WI 53703
(608) 256-7444
Attorneys for
Respondents-Appellees

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October Term, 1983

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v.

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Appellees.

ON APPEAL FROM A THREE-JUDGE COURT SITTING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN UNDER 28 U.S.C. § 2284(a)

REPLY TO JURISDICTIONAL STATEMENT MOTION TO DISMISS

This is a direct appeal under 28 U.S.C. § 1253 from an injunction entered by a three-judge federal district court on May 25, 1984, enjoining use of the reapportionment plan set forth in 1983

Wisconsin Act 29 on the ground that the plan unconstitutionally denies the right to vote for 174,000 Wisconsin citizens, where such denial is avoidable and unnecessary to repair constitutional defects in a reapportionment plan, and where less burdensome alternatives are available. For reasons stated below, Appellees move to dismiss.

QUESTION PRESENTED

Whether the two and four year delays in the right to vote for a state senator in the November 1984 general election, caused by a reapportionment plan drafted under a system of staggered senate terms constitutes an unconstitutional deprivation of the franchise.

PARTIES

The Appellees in this action (the plaintiffs in the federal district court),

are the Republican Party of Wisconsin and two individual Republican legislators, State Senator Donald S. Hanaway and State Representative Tommy G. Thompson. The League of Women Voters appears in the case as an intervening party.

The Appellants in this action (the defendants in the federal district court) include the Elections Board (the "Board"), an independent agency of the State of Wisconsin, its individual members Gary J.N. Aamodt, Thomas Palay, Eric Halverson, Esther Kaplan, Ron Monat, John Niebler, Helen Van Prooyen and Paul J. Swain, and its executive secretary, Kevin J. Kennedy.

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OPINIONS BELOW

The decision on appeal, set forth at App. 101-16, of the Appendix to Appellants' Jurisdictional Statement is reported at 585 F. Supp. 603 (1984).

CONSTITUTIONAL PROVISIONS INVOLVED

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, United States Constitution.

> The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and

> after the adoption of this amendment all senators shall be chosen for the term of four years.

Wis. Const. art. IV, §5.

STATEMENT OF THE CASE

The 1981-82 Wisconsin State Legislature failed to reapportion the State's legislative districts as required to correct the constitutional defects of the 1972 apportionment statute as revealed by the 1980 Federal Census. Numerous redistricting plans were introduced during regular and special sessions of the legislature, but none were successfully adopted.

The U.S. District Court for the Eastern District of Wisconsin issued its redistricting plan on June 9, 1982, (hereinafter "the court plan") after the legislature failed to enact any redistricting plan. No appeal of the court's decision was pursued.

The court plan governed the November, 1982 general election by which all 99 members of the state assembly and 17 of the 33-member state senate were elected. Over the next 9 months, five special elections were held, all under the court plan. Thus, 121 State Legislators were elected in 1982-1983 using the court plan.

More than a year after the legislature and the public accepted the court plan, the legislature added a new reapportionment plan to the 1983-1985 Biennial Budget Bill. That portion of the Budget Bill was vetoed by Governor Anthony S. Earl.

Subsequently, the governor called a special session to enact a reapportionment statute and on July 20, 1983, 1983 Wisconsin Act 29 (hereinafter "the Act") became effective. The Act radically changed the configurations of most of the

assembly and senate districts relied upon by Wisconsin voters in the 1982 general election.

On August 18, 1983, Appellees challenged the constitutionality of the Act and requested an injunction prohibiting its further use. The League of Women Voters became an intervening party, and also alleged the Act unconstitutional.

On May 25, 1984, the District Court declared the Act unconstitutional as it unnecessarily disenfranchises 173,976 Wisconsin citizens. The Act replaced a fully-implemented, constitutional apportionment plan. Thus, it was not necessary to correct any constitutional defects.

The court also noted that this unnecessary disenfranchisement could have been avoided by ordering all senators to

stand for election in 1984. Hence, less burdensome alternatives were available.

On May 29, 1984, the Petitioners appeared before the U.S. District Court to request a Stay of that court's decision. Later that same day, the court refused to stay its mandate. The Petitioners then filed an application for a Stay of the Mandate of the U.S. District Court for the Eastern District of Wisconsin to the Hon. John Paul Stevens, Associate Justice of the U.S. Supreme Court and Circuit Judge for the Seventh Circuit. Justice Stevens referred to the issue to the entire U.S. Supreme Court. The Stay of the Mandate of the Federal Court was entered by this Court on June 7, 1984, and a subsequent motion to vacate such stay was denied on July 2, 1984.

ARGUMENT

A. The Stay of Mandate of the District Court Panel Makes This Case Moot.

The issues in this case involve the right to vote in Wisconsin State Senate elections in 1984. Under the stay order of this Court, the state legislative reapportionment plan will be in effect for the 1984 state legislative elections. This means that 174,000 Wisconsin citizens will be deprived of their right to vote in 1984. It is too late to restore those voters' rights for the following reasons:

1. Campaigns for state senate seats are already underway under the legislative plan declared unconstitutional by the District Court. Some of the candidates would be ineligible for office were the District Court sustained because they would not then reside in their state senate district.

2. Neither party in this case has sought a special election to cure the defects in the apportionment plan declared unconstitutional by the District Court. The only issue in this case involves eligibility to vote in the 1984 general election.

For the above reasons, the Court should dismiss the case now before it and vacate the judgment of the three judge panel below.

B. The Question Presented is Substantial

The federal issue in this case is whether, and to what extent, voter participation in state senate elections is protected by the Constitution. Wisconsin law gives a right to vote for state senators once every four years. Because a staggered term system is required by the Wisconsin Constitution, half the state's senators are elected every two years.

When legislative districts are changed, delays of two years are experienced by some voters in state senate districts. Such delays have consistently been sustained by lower federal courts where those delays were an inescapable result of constitutionally required redistricting. See Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980); vacated on other grounds, 444 U.S. 505 (1980); Ferrell v. Oklahoma ex rel. Hall, 339 F. Supp. 73 (W.D. Okla. 1972), aff'd mem. sub nom., Ferrell v. Hall, 406 U.S. 939 (1972). No decision sustains a four year delay such as is experienced in this case by voters in districts inhabited by 28,950 persons.

The right to vote for state senators is given by state law, and thereafter strongly protected by the United States Constitution. Only a compelling state interest justifies delay or dilution of

the franchise. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

We do not argue that a state legislature may never revise a court-ordered apportionment plan. We only argue that voting rights once exercised and vested cannot be taken away as they were by the action of the Wisconsin Legislature in 1983. The Legislative reapportionment plan, declared unconstitutional by the District Court in this case:

1. was enacted after an election took place under a valid apportionment plan ordered by the District Court;

2. did not repair any constitutional defects in the court-ordered plan;

3. did not pursue legitimate secondary objectives;

4. deprived 28,950 inhabitants of the right to participate in an election

for state senators for an additional four years (leaving an eight year gap between such elections for the voters).

The legislative reapportionment plan, which the District Court declared unconstitutional, imposed additional durational residence requirements of two and four years on voters in predominantly rural and suburban areas. This Court has invalidated three month durational residence requirements, Dunn v. Blumstein, 405 U.S. 330 (1972). Even a 50 day delay, which was allowed, triggered strong dissents, Marston v. Lewis, 410 U.S. 679 (1973). If delays from 50 to 90 days are suspect then surely delays of two and four years are unconstitutional.

This Court has not squarely addressed the propriety of delaying votes because of redistricting. It has approved, without opinion, district court decisions that

have both allowed, and disallowed, such delays.

In Schaefer v. Thomson, 251 F. Supp. 450 (D.C. Wyoming 1965), aff'd mem. sub nom. Harrison v. Schaefer, 383 U.S. 269 (1969) the District Court found delays in the right to vote for state senators unnecessary, and, on constitutional grounds, ordered all elections for state senators to be held at the same time. However, in Ferrell v. Oklahoma, 339 F. Supp. 73 (W.D. Okla. 1972), aff'd sub nom. Ferrell v. Hall, 406 U.S. 939 (1972) the District Court justified a two-year delay as "unavoidable."

Decisions of the lower courts also conflict, although the differences may be explained by the relative importance of the staggered term requirements of state constitutions. Two decisions avoided postponed voting by ordering all state

senators to be elected at the next election: Petuskey v. Rampton, 243 F. Supp. 365 (D.C. Utah 1965). People v. Kerner, 210 N.E.2d 165 (Illinois 1965). In some states, such as Florida, Illinois, Minnesota, New Jersey and Texas, state law is construed to command that there be elections for the entire state senate following reapportionment. See Florida Constitution, Art. 3 Sec. 15a & 16; Illinois Constitution, Art. 4 Sec. 2 & 3; Minnesota Constitution, Art. 4, Sec. 24. Wisconsin, however, and many other states require that the staggered-term system be retained following reapportionment. In the case before this Court, the parties do not contest the staggered term rules.

Several recent decisions hold that if absolutely necessary a state may justify a delay in the exercise of the franchise for

as much as two years. We have found no decisions justifying a delay of four years as the 1983 Wisconsin plan commands.

The Colorado Supreme Court recently justified a two year delay in the right to vote for state senators:

> "Although reapportionment and election scheduling should preserve wherever possible the opportunity of all citizens to vote for state senator every four years, the complexities of the reapportionment process may result occasionally in a six year delay of the opportunity to vote for state senator. Where this result is absolutely necessary, it does not constitute a constitutional deprivation unless the change is shown to be the result of an invidious discrimination." (emphasis supplied)

In re Reapportionment of the Colorado General Assembly, 647 P.2d 191, 198 (Colorado 1982). The "absolute necessity" test justifies the two year delays in the Wisconsin 1982 plan. None was delayed four additional years. Nevertheless, the 1983 plan created two classes of delayed

voters for state senators. Because the 1983 plan was not necessary to repair constitutional defects, the delays in that plan (eight years elapse for some voters) fail the test of absolute necessity.

Consistent with the absolute necessity test, is the "unavoidable" rule applied in Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980). The court there concluded that shifts from odd-numbered to even-numbered senate districts, and a consequent additional two-year delay in the franchise for some voters was "an unavoidable consequence" of a reapportionment necessary to repair constitutional defects. In Wisconsin, unlike Tennessee, the delays are for up to four years, and the delays in Wisconsin were not unavoidable. The unavoidable test was applied in Ferrell v. Oklahoma, 339 F. Supp. 72 (W.D. Okla. 1972), aff'd

mem. sub nom. Ferrell v. Hall, 406 U.S. 939 (1972) wherein a two-year delay was tolerated. Also allowing two years (that is, six year intervals) are Stout v. Bottoroff, 249 F. Supp. 488, 495 (S.D. Ind. 1965); and McCall v. Legislative Assembly, 634 P.2d 223 (Oregon 1981).

The voting rights in this case were simply taken away from 174,000 citizens by the action of the Wisconsin Legislature. This action was both avoidable and unnecessary, and hence was declared unconstitutional by the District Court.

CONCLUSION

It has long been settled that the function of the Judiciary is limited to determining rights that are actually controverted in the particular case before the Court. Where, as here, those rights and obligations are no longer in controversy, it is customary for the case

to be dismissed and to vacate the judgment below.

Having brought the issue of mootness to the Court's attention, Appellees ask in the alternative that the Court give plenary consideration to this appeal, with briefs on the merits and oral arguement.

Dated at Madison, Wisconsin, this 24th day of August, 1984.

/s/

Gordon B. Baldwin
Law School
University of Wisconsin
Madison, WI 53706
(608) 263-2077

/s/

Kurt Newbury Schacht
McBurney, Wyngaard & Wilson
Suite 1000, Verex Building
150 East Gilman Street
Madison, WI 53703
(608) 256-7444

Attorneys for
Respondents-Appellees

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AUG 27 1984

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No. 84-150

IN THE

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October Term, 1983

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DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN
UNDER 28 U.S.C. 2284(a)

MOTION TO PROCEED AS INTERVENORS

REX R. REED &
DEBORAH L. REED
Husband and Wife
Affected Parties
4873 Irish Lane
Madison, WI 5711
608-835-9020

August, 1984

BEST AVAILABLE COPY

No. 84-150

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WISCONSIN ELECTIONS BOARD, et al.

Appellants

v.

THE REPUBLICAN PARTY OF WISCONSIN, et al.

Appellees

and

LEAGUE OF WOMEN VOTERS,

Intervening Party.

MOTION TO PROCEED AS INTERVENORS

This motion to intervene is made on two grounds: 1) The lower court's decision to deny our motion to intervene in their court and instead accept our

brief as an amicus submission was an abuse of discetionary authority; 2) the Supreme Court's June 7, 1984, stay has placed the Appellees in the position of arguing against their own political self interests.

As that is unlikely, no one will be left to defend the interests of Wisconsin's citizens. The League of Women Voters can take positions only after commit tees are appointed to study all questions raised by this issue followed by membership agreement. As a result, their timely input is not guaranteed.

We ask this court to reverse the three-judge panel in its denial of our motion to intervene. This denial was without explanation. This denial came even though the court eventually decided our senate district will be denied their constitutional right to elect

its senator.

In light of the fact that the lower court found that we have a constitutionally protected right to elect our senator and this right has been temporarily stayed by this court, it is necessary to allow us to intervene so that we may protect our and our fellow voters rights.

QUESTIONS PRESENTED

The constitutional questions presented are whether the 83 reapportionment plan is in violation of the Equal Protection Clause of the Fourteenth Amendment given the fact that the '83 plan was not necessary to establish a constitionally acceptable legislative reapportionment plan and is in violation of Art. IV (sec. 3 & 5) of the Wisconsin constitution.

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CONTITUTIONAL PROVISIONS INVOLVED:

> No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, United States Constitution.

> At its first session after each enumeration by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly....

Wis. Const. art. IV, sec. 3.

> The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen....The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts. The senators elected or holding over at the time of the adoption of this amendment shall continue in office till their successors are duly elected and qualified; and after the adoption of this amendment all senators shall be chosen for the term of four years.

Wis. Const. art. IV, sec. 5.

STATEMENT OF THE CASE

In 1981, the Democratically-controlled legislature and the Republican governor deadlocked over reapportionment. As a reult, a three-judge court sitting in the federal district court for the Eastern District of Wisconsin was compelled to apportion the state legislature after allowing the legislature and governor as much time as possible to settle their differences.

The 1982 election returned a Democratically controlled legislature and a Democratic governor. A new legislative apportionment was passed in 1983.

On August 18, 1983, the plaintiffs-appellees filed a supplemental complaint with the three-judge district court, and on May 25, 1984, the court ruled in favor of the plaintiffs by enjoining the further use of the 83 plan on the grounds

that the act unconstitutionally and unnecessarily disenfranchised over 173,000 state citizens.

The appellants moved for a stay but were denied by the three-judge court. The appellants filed a notice of appeal with this court on May 30, 1984. On June 7, 1984, this court entered a stay of mandate of the three-judge court pending timely docketing and ultimate disposition of the appeal.

ARGUMENT

The Lower Court's Ruling Was Correct.

The lower court correctly noted that the '83 plan unconstitutionally and unnecessarily disenfranchised 173,976 citizens of Wisconsin and violated the Wisconsin consitution.

Wisconsin's senators serve for a four-year term. Also, the state constitution staggers senate terms, so that half of the state senate comes up

for election at a time. As a result, the first election after reapportionment, many residents are denied the right to vote for their senator. For example, the '83 plan will prohibit 145,026 residents from participating in senate elections, and even more unfortunate, the '83 plan will make this upcoming fall election the second time in a row that 28,950 residents will be denied their right to vote for state senator.

The lower court's Decision and Order of May 25, 1984, properly observes that the federal constitution would allow the voter disenfrachisement inherent in the '83 plan only if such a plan was "absolutely necessary" or "unavoidable" in order to implement:

> a new plan that is passed to correct a constitutionally defective districting system.

What the Appellants have failed to

prove as a necessary element of their appeal is that the legislative apportionment that existed before the '83 plan was unconstitutional. Instead, they claim an unsupported right to "fine tune" an existing constitutional plan for unexplained reasons.

As a result, unless the appellants can prove that the apportionment in existence before the '83 plan was unconstituional, they should accept the ruling of the three-judge panel.

A. Reapportionment is a legislative function to be conducted within the confines of constitutional safeguards.

The constitution institutes apportionments in order to protect the value of a citizens vote. Likewise, legislatures as creations of constitutions are subject to the same duties as the consitutions that create them; therefore, they, too, have the

responsibility of protecting the right to vote. As a result of that responsibility, they cannot "fine tune" apportionments at the expense of the very people they are to protect without an articulate and defendable purpose.

The mere existance of a stated purpose is not sufficient cause to believe the legislature has met its responsibility; it must also meet the test of law.

In this case, the appellants have failed to show that the implementation of the '83 plan was an "absolute necessity" or "unavoidable" as required by constitutional law.

B. The three-judge court decision struck down the '83 legislative apportionment in order to protect the voter.

Because the appellants failed to explain the reasons for implementing the '83 apportionment and why that

apportionment was "absolutely necessary" or "unavoidable", the court had no alternative but to protect the rights of over 173,000 citizens to participate in senate elections.

Although apportionment is a legislative function, it is a legislative function only so long as they respect their constitutional responsibilities. If the legislature fails to respect its responsibilities to protect the citizens right to vote, the same constitution provides a safeguard of judicial review. In this case, the three-judge panel is not usurping legislative authority but preforming their judicial responsibilities. In having done so, the three-judge panel has protected our voting rights and the rights of over 173,000 Wisconsinites who want to participate in senate election.

C. Besides the 14th Amendment violation, the

'83 plan is also a violation of the state constitution.

The legislature does have the authority to apportionment the state legislature; however, the state constitution makes it clear that the redistricting must take place the "...firstsession after each enumeration made by the authority of the United States...." As the '83 plan was not enacted the first session after the federal census, it is unconstitutional by state as well as federal standards.

CONCLUSION

For the foregoing reasons, this Court should not summarily reverse the lower court's decision. In addition, it should affirm the lower court.

APPENDIX A

ORDER AND DECISION OF U.S. DISTRICT COURT EASTERN DISTRICT OF WISCONSIN DENYING REX AND DEBORAH REED INTERVENOR STATUS

The three-judge court denied Rex and Deborah Reed motion to intervene in their May 7, 1984, DECISION and ORDER. This appendix quotes from the last paragraph of that order:

> In response to our decision and order of February 10, 1984, one intervention request has been received. Rex R. Reed and Deborah L. Reed have moved to intervene in order to assert their claims that they, and other registered voters of the City of Fitchburg, will be denied their rights should Act 29 of the 1983 Wisconsin Acts be allowed to continue in force. The motion for intervention is denied. We will, however, consider the brief filed by Mr. Reed as an amicus submission to the Court.

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ALEXANDER L. STEVAS,
CLERK

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY TO MOTION TO DISMISS

BRONSON C. LA FOLLETTE
Attorney General
Counsel for Appellants
114 East, State Capitol
Madison, Wisconsin 53702
(608) 266-1222

ED GARVEY
Deputy Attorney General
DANIEL D. STIER
Assistant Attorney General

Of Counsel:

Daniel A. Rezneck
Merrick B. Garland
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724

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In their "Reply to Jurisdictional Statement and Motion to Dismiss," Appellees stated that there was no longer

a matter in controversy before the Court, and suggested that the judgment below be vacated. Id. at 21-22. Appellants, the Elections Board of Wisconsin, et al., wish to inform the Court that they do not oppose the entry of an order vacating the judgment of the district court, and remanding the case with instructions to dismiss the complaint. See, e.g., National Organization for Women v. Idaho, 459 U.S. 809 (1982); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General
Counsel for Appellants
114 East, State Capitol
Madison, Wisconsin 53702
(608) 266-1222

ED GARVEY
Deputy Attorney General
DANIEL D. STIER
Assistant Attorney General

Of Counsel:

Daniel A. Rezneck
Merrick B. Garland
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 872-3724

September 11, 1984